

My opinion, therefore, upon this part of the case is, that though the settlement will not be set aside as fraudulent, the plaintiff should be allowed to surcharge and falsify the account upon which, as I think, it was made; and the next question is, to what extent has he succeeded in proving the errors specified in his bill, for to these he must be restricted. 2 *Daniels' Ch. Pr.*, 765.

The court is to take the account as it is stated, and the *onus probandi* is upon the party having liberty to surcharge and falsify. If he can show an omission, he may surcharge; and if a wrong charge is made against him in the account, it will be stricken out, which is a falsification.

To what extent, then, has the plaintiff succeeded in pointing out errors of either description in the account, is the question.

It is first alleged, that in the account between the Savage Rail Road Company and the defendant, which is one of the elements of the account I. I., upon which the statement was made, the defendant was prejudiced by allowing him dividends only on the amount of the stock held by him in the rail road company, which was \$12,000, instead of on the whole capital of \$15,000. My opinion upon this is, that as that account was stated, the whole dividends should have been credited. It is an account between the two companies, and not between the complainant, as a stockholder in the rail road company, and the defendant. The road is charged with all the advances made to it by the defendant, and not with such proportion thereof as would correspond with the complainant's interest in the road. Surely, if the complainant is considered the sole proprietor of the road, so far as to charge him with all advances to it, he should be regarded in the same light with reference to credits.

I am not satisfied, however, that the defendant continued to use the road to the 1st of July, 1843, as alleged in the bill. The answer expressly denies it; and the proof offered in opposition to the answer I do not deem sufficient. The account, therefore, in this respect will stand, unless further and fuller proof shall be introduced.

The charge of ten per cent. on the cash balances cannot be